Director of Public Prosecution v Onsumu (Anti-Corruption and Economic Crimes Appeal E010 of 2022) [2023] KEHC 18359 (KLR) (Anti-Corruption and Economic Crimes) (19 May 2023) (Judgment)

Neutral citation: [2023] KEHC 18359 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

ANTI-CORRUPTION AND ECONOMIC CRIMES

ANTI-CORRUPTION AND ECONOMIC CRIMES APPEAL E010 OF 2022

PM NYAUNDI, J

MAY 19, 2023

BETWEEN

DIRECTOR OF PUBLIC PROSECUTION ..... APPLICANT

AND

GEORGE NYASIMI ONSUMU ..... RESPONDENT

(Being an appeal of the Sentence delivered by Hon. T. Nzyoki CM on 22nd August 2022 at the Chief Magistrates Court, Milimani in Anti-Corruption Case No. E006 of 2022)

JUDGMENT

Background

1. The Appellant herein, seeks to set aside the sentence meted out by the trial court in its decision of August 22, 2022, Vide Petition of Appeal dated September 8, 2022, presented under Section 348 A, 350 and 354 (3)(b) of the Criminal Procedure Code. The Appellant also filed a Notice of Enhancement of Sentence under Section, 354 (3)(b) of the Criminal Procedure Code.

2. The Appeal is stated to challenge the failure by the Learned Magistrate to impose the statutory applicable sentence under Section 18(1) of the *Bribery Act* No 47 of 2016 which provides: -

   18.

   (1) An individual found guilty of an offence under sections 5, 6, or 13- (a) shall be liable on conviction, to imprisonment for a term not exceeding ten years, or to a fine not exceeding five million shillings, or both;

(b) And may be liable to an additional mandatory fine if, as a result of the conduct constituting the offence, the person received a quantifiable benefit or any other person suffered a quantifiable loss.

(2) The mandatory fine referred to in subsection (1)(b) shall be—

(a) Equal to five times the amount of the benefit or loss described in subsection (l)(b);

(b) If the conduct that constituted the offence resulted in both a benefit and loss described in subsection (1)(b), equal to five times the sum of the amount of the benefit and the amount of the loss.

3. The Respondent faced 2 two counts.

Count 1: Receiving a bribe contrary to Section 6(1)(a) as Read with Section 18 of the *Bribery Act* No 40 of 2016

Particulars of the Offence George Nyasimi Onsomu: On the April 22, 2021 at Kasarani Sub County Offices, within Nairobi City County, being a person employed by a public body to wit, Nairobi City County Government as a Public Relations Officer in the City Inspectorate Department, requested a bribe of Kshs 180,000/- from Edward Wangong'u Ndichu with the intent that, in consequence, you would facilitate him to construct staircase and balcony containers at Clay City Ward Mwirirgo Area.

Count 2: Receiving a Bribe Contrary to Section 6(1) (a) as Read with Section 18 of the *Bribery Act* NO 47 of 2016.

Particulars of the Offence George Nyasimi Onsomu on the April 23, 2021 at Kasarani Sub County, being a person employed by a public body to wit, the Nairobi City County Government as Public Relations Officer in the City Inspectorate department received a bribe of Kshs 150,000 from Edward Wangong'u Ndichu with the intent that, in consequence, you would facilitate him to construct staircase and balcony on containers at Clay City Ward Mwirirgo Area.

4. The Respondent took plea on April 14, 2022, he denied both counts. On April 27, 2022, the Prosecutor informed the Court that the Respondent had written asking for a plea bargain. The Respondent confirmed this and the Court ordered that the matter be mentioned after a month to enable them pursue the matter of the plea bargain.

5. When the matter came up for mention on 4th July, the Prosecution indicated that they hoped to finalise the plea bargain prior to the hearing date and sought a mention in a weeks' time. The Court ordered that the matter be confirmed for hearing on August 22, 2022 if the plea bargain would not have been finalized.

6. On the August 22, 2022, when the matter came up for hearing again the plea bargain agreement was not ready and the Appellant opted to change his plea to guilty on both Counts, the Court proceeded to convict him on his own plea of guilty.

7. During the Sentence hearing the Prosecution brought to the attention of the Court the provisions of Section 18(1)(b) of the *Bribery Act*. Counsel argued that there was a quantifiable benefit and urged the following as aggravating circumstances; that the offence was committed by a public servant who owed the public a duty of care and that his conduct erodes the confidence in public institutions. The prosecution therefore urged the Court to give a sentence that was commensurate to the offence.

8. In mitigation the Respondent stated that he regretted his action. That as a consequence he had lost his job. He was a provider for his children who are in school. He had to relocate to the rural home. He urged the court to mete out a non-custodial sentence and promised the court to be a law abiding citizen.

9. The Court in its ruling dated August 22, 2022, proceeded to find that since the entire sum was recovered from the accused moments after it was handed over, no benefit accrued to the accused person neither did the complainant suffer any loss.

10. The Court then pronounced that it had considered the definition of an earned benefit and that in its view the treated money used by EACC for the purpose of investigation would not in the circumstance be deemed as a benefit.

11. The Court then considered the principles of sentencing, the circumstances of the case and the mitigation and sentenced the Respondent to: -

    Count 1- a fine of Kshs 150000, in default to serve 12 months imprisonment.

    Count 2- a fine of Kshs to serve 12 months imprisonment.

    The sentences to run consecutively.

12. The parties agreed to canvass the Appeal by way of written submissions. The Applicants Submissions are dated January 10, 2023, and those of the Respondent on January 18, 2023.

Summary Of Applicants Submissions.

13. The Applicant submitted that Section 18(1) (b) provides for a mandatory fine if as a result of the conduct constituting the offence, the person received a quantifiable benefit or any other person suffered a quantifiable loss.

14. It was submitted that the prosecution demonstrated that the Respondent received a quantifiable benefit. It was contended that the learned Magistrate misapprehended the law when he stated that since the money was recovered the Respondent had not received a quantifiable benefit.

15. The Applicant took issue with the learned Magistrate use of the term earned benefit which is not provided for under the statute. It is urged that by taking this interpretation the Learned Magistrate-acted upon the wrong principle and consequently erred in law and imposed an illegal sentence, thereby occasioning a miscarriage of justice.

16. It is submitted that the Magistrate in meting out the sentence was not guided by the Judicial Sentencing and guidelines principles. In particular, the principles relating to proportionality and deterrence. It is submitted that the sentence meted out is extremely lenient in the circumstances.

Summary Of Respondent's Submissions

17. The Respondent opposed the Appeal and submits that the Respondent was keen to compromise the matter by plea bargain but the Applicant was not responsive. The Respondent frames 2 issues for determination.

    i. Whether a judicial officer's discretion during sentence is limited?

    ii. Whether Section 18 (1) & (2) of the *Bribery Act* No 47 of 2016 must be applied concurrently.

18. It is submitted that the Respondent having pleaded guilty should see the benefit of that plea in the sentencing. A reduced sentence would enable all, the accused, the victim and the public to internalize

the benefits of plea bargaining or a plea of guilty. It is submitted that the Court should consider that the Respondent was not represented in the trial court.

19. The Respondent further urges that this court should consider that he was remorseful.

20. It was further submitted that Sentencing is also a crucial component of a trial and that the accused person should have the Court take into consideration the submissions as this was a key requirement to the right to a fair trial.

21. It is further contended that a judicial officer should have discretion when exercising the sentencing function and that shutting the door to discretion is not proper.

22. It was submitted that the Court should be guided by the provisions of Section 18 and that the couching of Section 18(1)(b) is not mandatory.

23. It is contended that no benefit accrued to the Respondent and no loss was occasioned to the Complainant.

24. The Respondent relies on the decision in *Shadrack Kipkoech Kogo vs R Eldoret Criminal Appeal No 253 OF 2003 (CA)* and *Wilson Waitegei V R [2021] eKLR* where the Court held: -

> ' Sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court take into account an irrelevant factor that the wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle and must be interfered with.'

25. The Respondent contends that the Applicant has not met the legal threshold for this court to interfere with the sentence.

26. On the discretion of a judicial officer in sentencing the Respondent relied on the decision in *Godfrey Ngotho Mutiso Vs R Cr App No 10 of 2018*, *Mithu v State of Punjab Criminal Appeal No 745 of 1980*, *Woodson v The State of North Carolina (Woodson) (1976) 428 US 280*.

27. It is submitted that there was no error in sentencing to justify the interference by this Court and reference made to the decision in *Wanjema V R (1971) KLR 493*.

Analysis And Determination

28. This being an Appeal against sentence I am guided by the principles guiding interference with sentencing by the appellate court as set out in *S vs Malgas 2001 (1) SACR 469 (SCA*) at para 12 where it was held that:

> ' A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as 'shocking', 'tartling' or 'disturbingly inappropriate'

29. The Court of Appeal, in *Bernard Kimani Gacheru vs Republic [2002] eKLR* has held that:

> ' It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist.'

30. Having regard to the Pleadings and the submissions of the parties herein and the guiding principles outlined I frame the following issue for determination

    i. Whether this court should interfere with the sentence meted out by the trial court?

31. In determining the said question, I will consider the following issues

    i. Whether the trial Magistrate acted on the wrong principle in determining the sentence

    ii. Whether the sentence meted by the Learned Magistrate was illegal

    iii. Whether the sentence meted out by the Learned Magistrate was lenient in the circumstances

32. The Applicant avers that the trial Magistrate erred in law in holding that the no benefit accrued to the Respondent, since the money was recovered immediately as this was a sting operation with treated money.

33. Section 6 of the Act provides: -

    (1) A person commits the offence of receiving a bribe if

    (a) The person requests, agrees to receive or receives a financial or other advantage intending that, in consequence, a relevant function or activity should be performed improperly whether by that person receiving the bribe or by another person;

    (b) The recipient of the bribe requests for, agrees to receive or accepts a financial or other advantage and the request, agreement or acceptance itself constitutes the improper performance by the recipient of a bribe of a relevant function or activity.

    (c) In anticipation of or as a consequence of a person requesting for, agreeing to receive or accepting a financial or other advantage, a relevant function or activity is performed improperly by that person, or by another person at the recipients' request, assent or acquiescence.

34. Section 18(1)(b) provides for an additional mandatory fine if, as a result of the conduct constituting the offence, the person received a quantifiable benefit or any other person suffered a quantifiable loss.

35. The Act does not define benefit, but instead defines advantage under Section 2 (a) to include money or any gift, loan, fee, reward, commission, valuable security or other property or interest in property of any description, whether movable or immovable;

36. This definition mirrors the definition of Benefit in the *Anti-Corruption and Economic Crimes Act*, 2011 which is defined to mean 'any gift, loan, fee, reward, appointment, service, favour, forbearance, promise or other consideration or advantage.'

37. It is clear therefore that 'advantage and benefit' can be used interchangeably when referring to the offence of receiving a bribe. As relates to the ingredients of the offence, I concur with the decision of Mativo J (as he then was) in *Michael Waweru Ndegwa v Republic [2016] eKLR* where he held

> ' The essential ingredients of the offence are that the accused must have received a benefit as defined above, that it must have been received corrupt as an inducement to bring about some given results in a particular matter, that the benefit must not be legally due or payable.'

38. As can be seen from the definition the offence is complete once the accused receives the benefit. It does not as was suggested require the accused person walks away with the benefit and has time to convert it to a tangible benefit. The moment the benefit is received by him the offence crystallizes. The Learned Magistrate therefore erred in law when he found that the Respondent had not benefited from the offence as the money was taken from him before he could 'enjoy' it.

39. The learned further misdirected himself when he referred to earned benefit, a concept that does not apply to the offence which the Respondent was charged with.

40. Having found that the Learned Magistrate misdirected himself on a material principle, the Court has a basis to examine further the sentencing hearing and determine whether it should interfere with the Court's discretion

41. It is suggested by the Applicant that the Trial Court meted out an illegal sentence. The basis of this averment is that Section 18(2)(b) is couched in mandatory terms and in purporting to mete a sentence other than the one provided by law, the sentence declared by the Court was illegal.

42. It is now well settled that the Court's discretionary power in sentencing cannot be fettered by mandatory sentences as this would be a violation of an accused person's right to a fair hearing as provided for under Article 50 of the *Constitution* of Kenya.

43. This was the ratio decidendi in the Supreme Court decision in *Francis Karioko Muruatetu & Anor vs Republic, Petition no 15 of 2015*, where the Court stated: -

> [48.] Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Articles 25 of the *Constitution*; an absolute right.

44. This was further elucidated upon in *Machakos HC Maingi & 5 Others vs Director of Public Prosecution & Anor Petition No E017 of 2021 [2022] eKLR*, in which the court expressed itself as hereunder

> 'The ratio decidendi of the case (the reasons for deciding) appears in paragraphs 47 to 53 which I have extensively set out hereinabove. In summary the reason for the decision was that failing to allow a Judge discretion to take into consideration the convicts' mitigating circumstances, the diverse character of the convicts, and the circumstances of the crime, but instead subjecting them to the same (mandatory) sentence thereby treating them as an undifferentiated mass and subjecting them to the sentence wholly disproportionate to the accused's criminal culpability, violates their right to dignity.'

45. Guided by these decisions I find that the Learned Magistrate did not err in meting out the sentence that he did in respect to Count II, the sentence was legal and the Magistrate was entitled to exercise his discretion.

46. The final issue for determination is whether the sentence meted out by the Court was lenient in the circumstances. As noted from the record, the Respondent pleaded guilty thus saving the Court's time this should have been credited to him. Secondly, he expressed remorse for the offence.

47. Whereas I agree with the Applicant that sentences should be both proportionate to the offence and have a deterrent effect, this must be tempered by the need of a criminal justice system that is not only retributive but also rehabilitative and restorative. In this instance, in addition to the Criminal sanction, the Respondent's employer had taken administrative action and dismissed him. At the time of sentencing he was unemployed.

48. In his mitigation the Respondent intimated that a harsh sentence meant that his children would also bear the brunt for his mistake. I think in cases where it is possible to mitigate the harm especially of minor children the Court should consider this. This is in keeping with the Constitutional interdict under Article 53(2) of the *Constitution* of Kenya that requires 'A child's best interests are of a paramount importance in every matter concerning the child.'

49. In *S Vs M [2008] (3) SA 232 (CC) 261* a decision of the Constitutional Court in South Africa Van Heerden AJ introduced the constitutional dimension in the following manner:

> ' I have anxiously considered the effect on the minor children of the sentence imposed by the magistrate, bearing in mind the constitutional injunction that 'a child's best interests are of paramount importance in every matter concerning the child', as also the constitutionally entrenched right of every child 'to family or parental care, or to appropriate alternative care when removed from the family environment'

50. Whereas in that decision the Court was weighing the demerits of a custodial sentence vis-a-vis a non-custodial sentence, the same reasoning would apply where the Court needs to factor in that the Children are dependent on the person against whom a fine is being imposed, especially in the current case where he stated that he was unemployed and the children would require school fees.

51. In the circumstances although I have taken a different route, I find myself at the same spot as the learned magistrate and find that on the basis of the totality of the facts presented in mitigation; the Appellant pleaded guilty, he was a first offender, he was remorseful and he had children who are dependent on him for livelihood, the sentence of a fine of Kshs 150,000 and in default 12 months imprisonment was reasonable in respect of Count II.

52. In view of the foregoing the Appeal fails in its entirety and I uphold the sentence of the trial court

53. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 19TH DAY OF MAY, 2023.

P M NYAUNDI

HIGH COURT JUDGE

IN THE PRESENCE OF: -

Court Assistant D Karani

Githinji.....Advocate... for Appellant

Kalii.....Advocate for Respondent